

1 MARTIN F. TRIANO, ESQ. (SBN 098272)

2 MARK D. BYRNE, ESQ. (SBN 109268)

3 **LAW OFFICES OF TRIANO & BYRNE**

4 25 Jessie Street, 16th Floor

5 San Francisco, CA 94105

6 Telephone: (415) 371-8000

7 Fax: (415) 371-8001

8 Email: marty@trianobyrne.com

9 mark@trianobyrne.com

10 Attorneys for Defendant METAQUOTES SOFTWARE CORP

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION

14 WILLIAM WILBER et al.,

15 Plaintiffs,

16 v.

17 TOP GLOBAL CAPITAL, INC. et al.

18 Defendants.

) CASE No.: SACV12 – 1448 AG

) (JPRX)

)

) **DEFENDANT METAQUOTES**

) **SOFTWARE CORP.'S**

) **AMENDED ANSWER TO**

) **PLAINTIFFS' FIRST**

) **AMENDED COMPLAINT**

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1 **I. ANSWER**

2 Defendant Metaquotes Software Corp (“MSC”) answers the allegations
3 made by Plaintiffs in their First Amended Complaint (“FAC”) as follows:

4 **JURISDICTION AND VENUE**

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6 1. MSC admits the allegation in paragraph 1 that this Court has subject
7 matter jurisdiction over this matter pursuant to 28 U.S.C. §1332, in so far as the
8 matter involves parties of diverse citizenship and the amount in controversy
9 exceeds \$75,000.

10 2. MSC admits the allegation in paragraph 2 that this Court has
11 supplemental jurisdiction over the non-federal claims asserted herein under 28
12 U.S.C. §1367.

13 3. MSC admits the allegation in paragraph 3 that this Court has personal
14 jurisdiction over MSC because MSC has appeared on this matter and has submitted
15 itself to this Court’s jurisdiction.

16 4. MSC admits the allegation in paragraph 4 that venue in this District is
17 proper pursuant to 28 U.S.C. §1391(g).

18 **THE PLAINTIFFS**

19 5. MSC lacks knowledge or information sufficient to form a belief as to
20 the truth or falsity of each and every allegation in paragraph 5 of this proceeding
21 and therefore denies the same.

22 6. MSC lacks knowledge or information sufficient to form a belief as to
23 the truth or falsity of each and every allegation in paragraph 6 of this proceeding
24 and therefore denies the same.

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1 7. MSC lacks knowledge or information sufficient to form a belief as to
2 the truth or falsity of each and every allegation in paragraph 7 of this proceeding
3 and therefore denies the same.

4 8. MSC lacks knowledge or information sufficient to form a belief as to
5 the truth or falsity of each and every allegation in paragraph 8 of this proceeding
6 and therefore denies the same.

7 9. MSC lacks knowledge or information sufficient to form a belief as to
8 the truth or falsity of each and every allegation in paragraph 9 of this proceeding
9 and therefore denies the same.

10 10. MSC lacks knowledge or information sufficient to form a belief as to
11 the truth or falsity of each and every allegation in paragraph 10 of this proceeding
12 and therefore denies the same.

13 11. MSC lacks knowledge or information sufficient to form a belief as to
14 the truth or falsity of each and every allegation in paragraph 11 of this proceeding
15 and therefore denies the same.

16 12. MSC lacks knowledge or information sufficient to form a belief as to
17 the truth or falsity of each and every allegation in paragraph 12 of this proceeding
18 and therefore denies the same.

19 13. MSC lacks knowledge or information sufficient to form a belief as to
20 the truth or falsity of each and every allegation in paragraph 13 of this proceeding
21 and therefore denies the same.

22 14. MSC lacks knowledge or information sufficient to form a belief as to
23 the truth or falsity of each and every allegation in paragraph 14 of this proceeding
24 and therefore denies the same.

OTHER DEFENDANTS

15. MSC admits that Defendant, Melody Phan (“Phan”), signed the Licensing Agreement with MSC for the use of the software, MetaTrader 4, on behalf of Wal Capital S.A. as the Chief Executive Officer (“CEO”) of Wal Capital S.A. on or about May 27, 2010. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Phan was, at all times relevant to this proceeding, a control person and principal of either Wal Capital S.A. before the Licensing Agreement with MSC or any time thereafter. MSC denies ever dealing with Wal Capital LLC. MSC admits Phan is currently a subject of an enforcement action instituted by the CFTC before this Court, No. 14-cv-00283. MSC admits that Phan defaulted in this proceeding. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation in paragraph 15 of this proceeding and therefore denies the same.

16. MSC admits that Marc Wallack (“Wallack”) has defaulted in this proceeding. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation in paragraph 16 of this proceeding and therefore denies the same.

17. MSC admits that Coldwell Ltd (“Coldwell”) has defaulted in this proceeding. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation in paragraph 17 of this proceeding and therefore denies the same.

18. MSC admits that Top Global Capital, Inc. (“TGC”) has defaulted in this proceeding. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every other allegation in paragraph 18 of this

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2 proceeding and therefore denies the same.

3 19. MSC admits that Wal Capital, LLC (“Wal USA”) has defaulted in this
4 proceeding. MSC lacks knowledge or information sufficient to form a belief as to
5 the truth or falsity of each and every other allegation in paragraph 19 of this
6 proceeding and therefore denies the same.

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8 20. MSC admits that Wal Capital Costa Rica (“Wal Capital”) has
9 defaulted in this proceeding. MSC lacks knowledge or information sufficient to
10 form a belief as to the truth or falsity of each and every other allegation in
11 paragraph 20 of this proceeding and therefore denies the same.

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13 21. MSC admits that My Forex Planet has defaulted in this proceeding.
14 MSC lacks knowledge or information sufficient to form a belief as to the truth or
15 falsity of each and every other allegation in paragraph 21 of this proceeding and
16 therefore denies the same.

17 22. MSC admits that CTN Systems Corp. (“CTN”) and Morris
18 Moskowitz have defaulted in this proceeding. MSC lacks knowledge or
19 information sufficient to form a belief as to the truth or falsity of each and every
20 other allegation in paragraph 22 of this proceeding and therefore denies the same.

21
22 **DEFENDANT MSC**

23 23. MSC admits that it is a corporation in the Bahamas. MSC denies that
24 MSC’s primary offices are in Cyprus. MSC denies that it ever provided any
25 services whatsoever to Wal USA. The only agreement that MSC entered into was
26 with Wal Capital. MSC lacks knowledge or information sufficient to form a belief
27 as to the truth or falsity of each and every other allegation in paragraph 23.
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BRIEF SUMMARY OF FACTS

24. MSC denies entering into any agreement to provide the MetaTrader 4 software to Wal USA. MSC denies that MSC had any knowledge of any “red flags,” relating to the Wal Capital, SA. MSC denies that Wal Capital was accepting investments from people in the United States, and that Wal Capital was supposed to be registered under the CEA. MSC lacks sufficient knowledge or information to determine whether it should have known that Wal Capital was operating in the United States, that Wal Capital was accepting investments from people in the United States, and that Wal Capital was supposed to be registered under the CEA; and therefore, denies this allegation. MSC denies that it conducts business illicitly in the United States. MSC lacks knowledge or information sufficient to form a belief as to every other allegation in paragraph 24 in this proceeding and therefore denies the same.

AMENDED STATEMENT OF FACTS

25. MSC admits that the Amended Statement of Facts in the FAC supersedes and replaces the Statement of Facts in prior Pleadings as to MSC as alleged by Plaintiffs.

26. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation in paragraph 26 in this proceeding and therefore denies the same.

27. MSC lacks knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation in paragraph 27 in this proceeding and therefore denies the same.

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1 28. MSC lacks knowledge or information sufficient to form a belief as to
2 the truth or falsity of each and every allegation in paragraph 28 in this proceeding
3 and therefore denies the same.

4 29. MSC lacks knowledge or information sufficient to form a belief as to
5 the truth or falsity of each and every allegation in paragraph 29 in this proceeding
6 and therefore denies the same.

7 30. MSC lacks knowledge or information sufficient to form a belief as to
8 the truth or falsity of each and every allegation in paragraph 30 in this proceeding
9 and therefore denies the same.

10 31. MSC lacks knowledge or information sufficient to form a belief as to
11 the truth or falsity of each and every allegation in paragraph 31 in this proceeding
12 and therefore denies the same.

13 32. MSC lacks knowledge or information sufficient to form a belief as to
14 the truth or falsity of each and every allegation in paragraph 32 in this proceeding
15 and therefore denies the same.

16 33. MSC lacks knowledge or information sufficient to form a belief as to
17 the truth or falsity of each and every allegation in paragraph 33 in this proceeding
18 and therefore denies the same.

19 34. MSC lacks knowledge or information sufficient to form a belief as to
20 the truth or falsity of each and every allegation in paragraph 34 in this proceeding
21 and therefore denies the same.

22 35. MSC lacks knowledge or information sufficient to form a belief as to
23 the truth or falsity of each and every allegation in paragraph 35 in this proceeding
24 and therefore denies the same.

1 36. MSC lacks knowledge or information sufficient to form a belief as to
2 the truth or falsity of each and every allegation in paragraph 36 in this proceeding
3 and therefore denies the same.

4 37. MSC lacks knowledge or information sufficient to form a belief as to
5 the truth or falsity of each and every allegation in paragraph 37 in this proceeding
6 and therefore denies the same.

7 38. MSC lacks knowledge or information sufficient to form a belief as to
8 the truth or falsity of each and every allegation in paragraph 38 in this proceeding
9 and therefore denies the same.

10 39. MSC denies the allegation in paragraph 39 that MSC would receive a
11 commission in the form of a “pip” for the trades executed on behalf of either Wal
12 Capital or Wal USA. MSC did not and does not receive any commission for a
13 trade executed on its software. MSC lacks knowledge or information sufficient to
14 form a belief as to the truth or falsity of each and every other allegation in
15 paragraph 39 in this proceeding and therefore denies the same. MSC denies
16 making any representations to Plaintiffs as alleged in paragraph 39.

17 40. MSC denies each and every allegation in paragraph 40 in this
18 proceeding.

19 41. MSC lacks knowledge or information sufficient to form a belief as to
20 the truth or falsity of the allegation in paragraph 41 regarding either Wal Capital’s
21 or Wal USA’s conduct. MSC denies the allegation in paragraph 41 that it was
22 conducting business in the United States with the other currency trading firms
23 while not being authorized to transact business in the State of California or any
24 other State at the time it chose to conduct business with Wal Capital. MSC never
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1 conducted business with Wal USA. Upon information and belief based on MSC's
2 current investigation on the matter, MSC is not required to obtain a Tax
3 Identification Number nor file Federal or State Tax Returns.

4 42. MSC denies each and every allegation in paragraph 42 in this
5 proceeding as to MSC. MSC lacks knowledge or information sufficient to form a
6 belief as to the truth or falsity of the allegation in paragraph 42 regarding either
7 Wal Capital or Wal USA.

9 43. MSC denies the allegation in paragraph 43 that it ever received
10 commissions and fees in the form of "pips" for all currency trades conducted on
11 behalf of either Wal Capital or Wal USA at any time. The only fees MSC received
12 were the license fee and technical support fee from Wal Capital. MSC never
13 received any commissions from either Wal Capital or Wal USA. MSC denies the
14 allegation in paragraph 43 that all trades executed on behalf of either Wal Capital
15 or Wal USA on which MSC earned "pips" were made in violation of the
16 registration provisions of the CEA. MSC lacks knowledge or information
17 sufficient to form a belief as to the truth or falsity of the allegation in paragraph 43
18 that both Wal Capital and Wal USA were neither registered nor exempt from
19 registration under the CEA.

22 44. MSC lacks knowledge or information sufficient to form a belief as to
23 the truth or falsity of allegation in paragraph 44 that in December 2010, the Wal
24 Capital scheme hit a roadblock. MSC lacks knowledge or information sufficient to
25 form a belief as to the truth or falsity of the allegation in paragraph 44 that on or
26 about December 9, 2010, Swiss financial regulators "blacklisted" either Wal
27 Capital or Wal USA. MSC denies the allegation in paragraph 44 that MSC could
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no longer lawfully transact business with Wal Capital. MSC never conducted business with Wal USA. MSC denies the allegation that MSC received any portion of the funds allegedly lost by Plaintiffs in currency trading as commissions in the form of “pips.”

CAUSES OF ACTION

45. The causes of action for Negligence, Breach of Contract, Conversion/Aiding and Abetting Conversion, and Unjust Enrichment against MSC have all been dismissed by this Court and Plaintiffs did not amend these causes of action. The only remaining cause of action against MSC is Aiding/Abetting Violations of the CEA.

I. NEGLIGENCE

(against MSC)

46. MSC’s admits, denies, or lacks knowledge or information to form a belief as to the truth or falsity of the allegation in the previous paragraphs 1 through 44 of this Answer in response to Plaintiffs’ FAC paragraphs 1 through 44. Paragraphs 46 through 50 of the FAC, specifically the incorporation paragraphs, are moot because the cause of action for Negligence against MSC has been dismissed by this Court and Plaintiffs did not amend. The only remaining cause of action is the Aiding/Abetting Violations of the CEA.

II. BREACH OF CONTRACT

(against MSC)

47. MSC’s admits, denies, or lacks knowledge or information to form a belief as to the truth or falsity of the allegation in the previous paragraphs 1 through 44 of this Answer in response to Plaintiffs’ FAC paragraphs 1 through 44.

Paragraphs 46 through 50 of the FAC and paragraphs 51 through 53 of the FAC, specifically the incorporation paragraphs, are moot because the causes of action for Negligence and Breach of Contract against MSC have been dismissed by this Court and Plaintiffs did not amend. The only remaining cause of action is the Aiding/Abetting Violations of the CEA.

III. CONVERSION/AIDING AND ABETTING CONVERSION (against MSC)

48. MSC's admits, denies, or lacks knowledge or information to form a belief as to the truth or falsity of the allegation in the previous paragraphs 1 through 44 of this Answer in response to Plaintiffs' FAC paragraphs 1 through 44. MSC denies that Phan and Wallack were agents or apparent agents of MSC at any point in time. MSC never authorized Phan or Wallack to be MSC's agent or representative. Paragraphs 46 through 53 of the FAC and paragraphs 54 through 57 of the FAC are moot because the causes of action for Negligence, Breach of Contract, and Conversion/Aiding and Abetting Conversion against MSC have been dismissed by this Court and Plaintiffs did not amend. The only remaining cause of action is the Aiding/Abetting Violations of the CEA.

IV. AIDING/ABETTING VIOLATIONS OF THE COMMODITIES EXCHANGE ACT (against MSC)

49. MSC's admits, denies, or lacks knowledge or information to form a belief as to the truth or falsity of the allegation in the previous paragraphs 1 through 44 of this Answer in response to Plaintiffs' FAC paragraphs 1 through 44. Paragraphs 46 through 57 of the FAC are moot because the causes of action for Negligence, Breach of Contract, and Conversion/Aiding and Abetting Conversion

1 against MSC have been dismissed by this Court and Plaintiffs did not amend. The
2 only remaining cause of action is the Aiding/Abetting Violations of the CEA.

3 50. Plaintiffs quote correctly Section 22(a)(1) and Section 25(a) of the
4 CEA in paragraph 58 of the FAC. There are no facts alleged by Plaintiffs in
5 paragraph 58.
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7 51. MSC denies all allegations in paragraph 59 of the FAC that MSC
8 aided and abetted Phan, Wallack, Wal USA, and Wal Capital in their respectively
9 wrongful conduct in violations of the CEA. MSC admits solely to licensing Wal
10 Capital for the use of the MetaTrader 4 software for a limited period of time. MSC
11 denies any license with Phan, Wallack, and Wal USA. MSC lacks knowledge or
12 information to form a belief as to the truth or falsity of the allegations of the
13 wrongful conduct Phan, Wallack, Wal Capital, and Wal USA alleged in paragraph
14 59 of the FAC and therefore denies the same.
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16 **V. UNJUST ENRICHMENT**

17 **(against MSC)**

18 52. MSC's admits, denies, or lacks knowledge or information to form a belief as
19 to the truth or falsity of the allegation in the previous paragraphs 1 through 44 of
20 this Answer in response to Plaintiffs' FAC paragraphs 1 through 44. Paragraphs
21 46 through 57 and paragraphs 60 through 62 of the FAC are moot because the
22 causes of action for Negligence, Breach of Contract, Conversion/Aiding and
23 Abetting Conversion, and Unjust Enrichment against MSC have been dismissed
24 by this Court and Plaintiffs did not amend. The only remaining cause of action is
25 the Aiding/Abetting Violations of the CEA.
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II. AFFIRMATIVE DEFENSES

First Affirmative Defense

1. Plaintiffs’ claims against MSC are barred in whole or in part because they fail to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure (“FRCP”) § 12(b)(6).

Second Affirmative Defense

2. Plaintiffs’ claims against MSC are barred in whole or in part because they fail to state a claim upon which relief can be granted pursuant to FRCP §12(b)(1) because Plaintiffs do not fall into any of the categories of persons that may bring a private cause of action under 7 U.S.C. §25(a)(1)(A)-(D). Those that may bring a private cause of action under 7 U.S.C. §25 are the following:

“(A) who received trading advice from such person for a fee;
 (B) who made through such person any contract of sale of commodity for future delivery (or option on such contract or any commodity) or any swap; or who deposited with or paid such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;
 (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale— (i) an option subject to section 6c of this title (other than an option purchase or sold on a registered entity or other board of trade); (ii) a contract subject to section 23 of this title; ...(iii) an interest or participation in commodity pool; or (iv) a swap; or

(D) who purchased or sold a contract referred to in subparagraph (B)...”

Third Affirmative Defense

3. Plaintiffs’ claims against MSC are barred in whole or in part because they fail to state a claim upon which relief can be granted pursuant to FRCP §12(b)(6) because Plaintiffs lack standing. Plaintiffs did not: (A) receive trading advice from MSC or anybody else for a fee; (B) make through MSC or anybody else any contract of sale of a commodity or any swap; or who deposited with or paid such person money, securities, or property (incurred debt in lieu thereof) in connection with any order to make such contract or any swap; (C) purchase from or sold to MSC or anybody else or placed through MSC or anybody else an order for purchase or sale; or (D) purchase or sold a contract. Any of the foregoing actions, if any occurred, were by Wal Capital as alleged by Plaintiffs.

Fourth Affirmative Defense

4. Plaintiffs’ claims against MSC are barred in whole or in part because pursuant to 7 U.S.C. §25(c) the Statute of Limitations for Aiding/Abetting Violations of the CEA of two (2) years has lapsed.

Fifth Affirmative Defense

5. Plaintiffs’ claims against MSC are barred in whole or in part because the underlying alleged principal, Wal Capital, has not been judicially determined on the merits to have violated the CEA.

Sixth Affirmative Defense

6. Plaintiffs’ claims against MSC are barred in whole or in part because of Doctrine of Laches.

Seventh Affirmative Defense

7. Plaintiffs' claims against MSC are barred in whole or in part because there is no privity between MSC and Wal USA, or contract for the license of MetaTrader 4, or no privity between MSC and Plaintiffs as individuals. MSC's contract for the license of MetaTrader 4 was with Wal Capital.

Eighth Affirmative Defense

8. Plaintiffs' claims against MSC are barred in whole or in part because of Plaintiffs' own conduct, such as but not limited to, by not investigating their investment vehicles such as Wal Capital or investigating Phan's background in investments.

Ninth Affirmative Defense

9. Plaintiffs' claims against MSC are barred in whole or in part because the conduct of others was the proximate cause of Plaintiffs' damages, if any. MSC licensed Wal Capital. Wal USA, Phan, and others were never authorized by MSC to advise or make representations to Plaintiffs in anything, such as but not limited to investments and how the business was operated. On MSC's information and belief, MSC was merely the licensor of software utilized by Wal Capital or other third parties to make trades. The software is licensed to Wal Capital, not Wal USA. Wal Capital actively made investment decisions and Phan orchestrated the scheme that Plaintiffs have described.

Tenth Affirmative Defense

10. Plaintiffs' claims against MSC are barred in whole or in part because of Plaintiffs' lack of due diligence, including but not limited to taking actions before investigating a FOREX broker, before investigating Phan, and before

investigating Wal Capital or Wal USA, prior to obtaining shares or a membership in Wal Capital or Wal USA.

Eleventh Affirmative Defense

11. Should Plaintiffs recover damages from MSC, MSC is entitled to equitable indemnification, either in whole or in part, from all other Defendants that may have contributed to Plaintiffs' damages, if any exist.

Twelfth Affirmative Defense

12. Should Plaintiffs recover damages from MSC, MSC is entitled to implied indemnification, either in whole or in part, from all other Defendants that may have contributed to Plaintiffs' damages, if any exist. Pursuant to the Tort of Another Doctrine, MSC is entitled to their attorneys' fees for having to defend this action.

Thirteenth Affirmative Defense

13. Plaintiffs' claims against MSC are barred in whole or in part because pursuant to the License Agreement executed between MSC and Wal Capital and that Wal Capital transferred the License to Apex, MSC is "not liable for any legal actions or claims of the Licensee's customers arising from relations between the Licensee and its customers, relating to the operation of the System ..." From the FAC, Plaintiffs alleged that Wal Capital was formed to handle Plaintiffs' pooled investment and Plaintiffs are customers of Wal Capital.

Fourteenth Affirmative Defense

14. Because Plaintiffs have alleged that attorney's fees are awardable for Breach of Contract claim which has now been dismissed, MSC is entitled to their attorneys' fees as a recoverable cost.

Fifteenth Affirmative Defense

15. Plaintiffs are not entitled to damages because the cause of action of Aiding/Abetting Violations of the CEA belongs to Wal Capital since Plaintiffs are merely shareholders of Wal Capital. From the FAC, Plaintiffs alleged all trades were done by Wal Capital. Pursuant to 7 U.S.C. §25(a), a valid private cause of action for Aiding/Abetting Violations of the CEA will only subject the Defendant to liability for actual damages. Plaintiffs did not suffer actual damages. Plaintiffs alleged damages to Wal Capital but failed to allege damages suffered by the Plaintiffs individually or collectively. The alleged damages, if any, were allegedly suffered by Wal Capital. Therefore, the individual Plaintiffs do not have standing to bring this cause of action.

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CONCLUSION

WHEREFORE, Defendant METAQUOTES SOFTWARE CORP prays for judgment as follows:

- 1. That Plaintiffs are not entitled to any relief as to the only remaining cause of action, Aiding/Abetting Violations of the CEA, against MSC;
- 2. That MSC be dismissed from this case and awarded attorneys’ fees and costs incurred herein; and
- 3. For such other and further relief as the Court may deem just and proper.

Dated: December 30, 2014 Respectfully submitted,
LAW OFFICES OF TRIANO & BYRNE

By: /s/ Mark D. Byrne
MARK D. BYRNE, ESQ.
Of Counsel
Attorney for Defendant,
METAQUOTES SOFTWARE CORP